No. 20384

IN THE

# United States Court of Appeals For the Ninth Circuit

---

BAKER & FORD CO., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
*Appellants,*

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING CO.,
a corporation,
*Appellee.*

---

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR ALASKA

---

HONORABLE RAYMOND E. PLUMMER, *Judge*

---

## BRIEF OF APPELLEE

---



DONALD McL. DAVIDSON
WILLIAM B. MOORE
Attorneys at Law
929 Logan Building
Seattle, Washington 98101
*Attorneys for Appellee*

METROPOLITAN PRESS SEATTLE, WASHINGTON

## SUBJECT INDEX

## TABLE OF CASES

**ANNOTATIONS AND TEXTBOOKS**

## STATUTES & RULES



## OTHER AUTHORITIES

IN THE

# United States Court of Appeals For the Ninth Circuit

No. 20384

BAKER & FORD CO., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
*Appellants,*

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING CO.,
a corporation,
*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

## BRIEF OF APPELLEE

### JURISDICTION

**(Findings V, VI, Conclusion of Law I)**

**District Court**

Jurisdiction was alleged under the Miller Act (40 U.S.C. §270(a) to §270(e)) and under 28 U.S.C. §1332 (R. 1). The court found that plaintiff finished its work under the subcontract in November or December of 1960 (R. 83).

The complaint was filed October 31, 1961 (R. 1). The court determined this was ample basis for jurisdiction under the Miller Act (Finding VI; R. 84).[1]

Facts adequate to sustain jurisdiction based on diversity of citizenship (Finding I; R. 82, 83) were also found.

**This Court**

This Court has jurisdiction of this appeal under 28 U.S.C. §1291 and §1294.

## COUNTER-STATEMENT OF THE CASE

This is not a complicated case on the law; slightly more so on its facts. Basically, it follows the pattern of the usual Miller Act controversy between a prime contractor and a subcontractor. Urban Plumbing & Heating Co. (hereafter "Urban") is the subcontractor, was plaintiff and prevailing party below. Baker & Ford Co. (hereafter "Baker" or "Appellant") is the prime contractor and Appellant in this Court.

Baker, as the prime contractor, was engaged in work on a ballistic missile early warning site for the U.S. Department of Defense under several contracts, at Clear, in the State of Alaska. Baker's job requirements on the contract

1. Appellant argues that work performed by Urban during October, 1961, made the complaint premature and defeats Miller Act jurisdiction (Br., p. 65). The argument is frivolous. The court found that this work was a modification to the contract (Finding V, R. 84), following completion in 1960. Moreover, a supplementary complaint was filed on March 22, 1963 (R. 33), more than 90 days after performance of the added work and prior to acceptance. Miller Act jurisdiction therefore attached under the supplementary complaint in any event. *United States v. Reiten*, 313 F.2d 673 (9th Cir., 1963).

here involved were spelled out in Contract DA-92-507eng-1302 (hereafter "1302"). Contract 1302 called for the construction of a composite building consisting of two dormitory wings and eating and recreational facilities to be served by underground sewers, water, power and other utilities (Ex. O).

Baker awarded the mechanical work as set out in the plans and specifications on 1302 to Urban. (Urban's job responsibilities are described at Tr. 32-36 Tr. 113.)*

Originally, the contract called for final completion on May 31, 1960 (Ex. O). Due to strikes during the summer of 1959, this completion date could not be met. In fact, virtually no work was performed during the 1959 construction season (Tr. 432). Accordingly, Baker agreed with the Army Corps of Engineers to set a new feasible and reasonable completion date (Tr. 392, 397; 400; Ex. 38; Finding VIII, R. 85, Unchallenged here). After a considerable period of negotiation, Baker and the Army Corps of Engineers formalized their agreement on completion dates as follows:

| | | |
|---|---|---|
| First Wing | — | October 15, 1960 |
| Second Wing | — | November 15, 1960 |
| All Other | — | December 15, 1960 |

(Exs. 27, 28)

As thus formalized, this agreement was known as "Modification 6."

The Department of Defense, however, was most anxious to man the Ballistic Early Warning Site at the earliest

*Tr refers to the reporter's transcript; R refers to the court file.

possible date. Accordingly, the Corps of Engineers negotiated with Baker to accelerate the Modification 6 completion dates. Baker knew 1302 would be accelerated and that additional money was available as compensation for the speedup as early as April 8, 1960. This was established unequivocally by the testimony of Baker's Project Manager, Bernardi (Tr. 408, 413, 414). Written corroboration fixing the approximate periods of these negotiations appears in a letter from the Corps of Engineers dated April 29, 1960, which directed advancement of the completion dates on 1302 by one month and requested Baker to submit a cost proposal (Ex. 25). Immediately thereafter, early in May, Sam Baker, President of Baker, told Urban "that the job had been accelerated and we [Urban] should get a cost proposal into Baker & Ford at the earliest possible convenience." (Tr. 104. And see Tr. 105; 48-49.)

Shortly after or at the time it became known the contract would be accelerated, Baker posted a construction schedule to be met by the prime contractor and all subcontractors.[2] This schedule required completion by them at the same dates directed by the Corps of Engineers in

2. Markings on the schedule indicated it was issued April 22 (Ex. I; see Tr. 424). In its brief, Baker underplays, even appears to deny (Br., p. 33) the simultaneous occurrence of the Corps of Engineers' negotiation with Baker looking toward advanced completion dates and the posting of the construction schedule setting virtually the same completion dates ultimately agreed to between them. Plainly, as the trial court impliedly found, these events were no coincidence. (See also Tr. 421-422). The construction schedule was the implementation of Baker's anticipated agreement with the Corps of Engineers as to the advanced completion dates or implementation of the direction to so accelerate which Baker was obligated to do under his contract with the Government regardless of agreement by formal modification of his contract.

its letter to Baker as to the first and second wing and one month earlier than directed by the Corps of Engineers as to all others (Ex. I). As ultimately formalized in Modification 11 executed June 27, 1960, completion dates were set as follows:

| | |
|---|---|
| First Wing | — September 15, 1960 |
| Second Wing | — October 15, 1960 |
| All Other | — November 15, 1960 |

(Ex. 26)

At this point, of course, under the terms of the subcontract, the completion dates binding Baker became equally binding on Urban (Ex. H; Tr. 427, 429, 431, 432). Some 80% of Urban's job responsibilities were accelerated (Tr. 113), particularly the outside utility work. Baker gave every indication during physical construction that Urban would be compensated (Tr. 104, 107). Baker chose not to disclose, however, that he had actually formalized an agreement with the Corps of Engineers providing increased compensation for the acceleration (Tr. 112). Meanwhile, Baker told Urban to work according to the construction schedule (Tr. 636) to figure the job done by September 15 (Tr. 657), and to "get the thing speeded up" (Tr. 444. See also p. 11, McGonigal Deposition, at Tr. 773, *et seq.*). Urban, in response to Baker's invitation, put in notice of his forthcoming claims for increased costs early in May, 1960 (Tr. 423, and see Tr. 106). Early in May, 1960, Urban submitted an estimate of costs (Ex. 8). Baker said to refigure it on a different basis. Urban did so and resubmitted another cost claim shortly thereafter (Ex. 9) (See Tr. 49, 107, 108). Both claims included requests of

Urban's own subcontractors for acceleration costs. Repeatedly thereafter, Urban inquired as to the disposition of the claim, unaware of the fact that Baker, on June 27, 1960, had formally entered into a modification with the Corps of Engineers (Tr. 181); Ex. AA, Ex. 18(a), 18C; Tr. 457, 468; Exs. S, T; Tr. 662, 669, 670.

In each instance, Baker put Urban off. Finally, at a meeting at the Washington Athletic Club in Seattle long after completion of the work, the matter came to a head. Urban again sought to settle with Baker on a price for the costs incident to the acceleration. But to the astonishment of Urban, Sam Baker, President of Baker, killed the negotiation aborning with his remark, "What acceleration"? (Tr. 112; 186).

It now being clear that further negotiation with Baker would be futile, Urban commenced this action in the United States District Court of Alaska for damages attributable to the acceleration (R. 1). In addition, Urban sought compensation for items of extra work alleged to be beyond the scope of the subcontract (R. 35-36). Baker, in its Answer, generally denied everything (R. 6-7, R. 41-42), and raised questions of the Statute of Limitations and Urban's legal capacity to sue (R. 42). An extensive trial followed.

Shortly thereafter, the court rendered a Memorandum of Decision, finding substantially for Urban on the acceleration claim and granting and denying some items of Urban's extra work claims (R. 71-76). Baker then filed a list of "Objections to Memorandum of Decision" (R. 77-

81). Findings of Fact, Conclusions of Law and Judgment issued (R. 82-95). Baker then moved for a new trial (R. 96) and to amend the Findings of Fact (R. 97). Memoranda were submitted on each of the motions by both parties and after a thorough review, the court adhered to its earlier judgment (R. 164-166). This appeal follows from the final Judgment and denial of the post-trial motions.

## SUMMARY OF ARGUMENT

The issues raised by Appellant constitute a thinly supported attack on the District Court's findings of facts and determinations as to the admissibility of evidence, all of which were supported and well within that court's discretion under universally recognized standards of review. We have attempted to isolate the vital legal points raised by appellants, and where factual issues are involved, point out to the court some of the direct evidence which sustains the findings of the District Court. We believe the record will establish these points:

A. The Finding That An Acceleration Occurred Was Clearly Required by the Proof at Trial.

B. The Evidence Establishes That the Acceleration Increased the Burdens of the Subcontractor Beyond Those Originally Contemplated Under the Contract and Therefore Constituted "Extra Work" Subject to Compensation.

C. Urban Did Not Voluntarily Incur the Increased Costs of the Acceleration.

D. Competent Evidence Established the Fact of Damage and Its Amount.

E. The Contract Requirement That Extras Be Previously Agreed Upon in Writing Was Waived

F. Extras Beyond the Scope of the Subcontract Were Performed by Urban and Substantial Evidence Supports the Award of Compensation.

1. Connection of Kitchen Equipment

2. Connecting Waterlines and Drains to Refrigerator

3. Installation of Grease Interceptor extensions

4. Repairing Water Main Leak

G. Bond Premium and Alaska Business Tax Are Proper Items of Damage.

H. The Award of Interest Was Proper Under the Undisputed Facts.

I. The Award of Attorney's Fees Was Proper.

J Contrary to Appellant's Insinuations, the Trial Judge Conducted a Fair and Impartial Inquiry.

Appellant's brief contains 42 specifications of error, 23 of which are apparently consolidated under its acceleration argument (Part One), 11 discussed under the four specific extra claims (Part Two), one discussed under the requirement of a written order (Part Three), two mentioned under interest (Part Four), two cited under attorneys' fees (Part Five), one argued under bond premium (Part Six), and three considered under jurisdiction (Part Seven).

Many specifications of error are said to be argued in

more than one section. Appellee finds no argument as to specifications of Error III, IV, V and VI.

## ARGUMENT

### The Finding That an Acceleration Occurred Was Clearly Required by the Proof at Trial (Findings IX, XII).

As Baker acknowledges, the finding (R. 86-87) that Urban's performance under the subcontract was accelerated must be "clearly erroneous," before this court may substitute its appraisal of the evidence for that of the District Court, Rule 52(a) F.R. Civ. P. Under familiar principles limiting review, this means the finding must stand unless:

> ". . . The reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

This limitation on review applies equally whether the finding is predicated on the credibility of witnesses or is a matter resolved largely on undisputed evidence. *Lundgren v. Freeman,* 307 F.2d 104, 113-115 (9th Cir., 1962).

Abundant evidence, testimonial and written, much of it detailed in the counter-statement of facts but repeated here for emphasis, demonstrates that earlier completion dates were set by Baker than were originally contemplated, or could reasonably have been required, under the subcontract (Tr. 73). Baker acknowledges that the original May 31, 1960 completion date "could not be met" (App. Br., p. 23), due to strikes (Tr. 608). New completion dates

were therefore set. These dates were a reasonable forecast of the minimum time necessary to complete work under 1302 at a price fairly within the responsibilities of the parties under the contract as originally written (Tr. 731, 392, 397, 400; see Ex. 38; Finding VIII; R. 85 (undisputed here)). These dates were known to all parties involved with 1302 and were formalized in Modification 6 as follows:

| | |
|---|---|
| First Wing | — October 15, 1960 |
| Second Wing | — November 15, 1960 |
| All Other | — December 15, 1960 |

Again, it is undisputed that these dates were in turn advanced by Modification 11, as follows:

| | |
|---|---|
| First Wing | — September 15, 1960 |
| Second Wing | — October 15, 1960 |
| All Other | — November 15, 1960 |

Baker did not disclose to Urban that it had reached agreement with the Corps of Engineers as to compensation for the acceleration (Tr. 112-125, 126, 274). Baker told Urban to work according to the construction schedule (Tr. 636) and to "get the thing speeded up" (Tr. 444), giving no indication that Urban would not be compensated. On the contrary, Urban had every reason to believe, and did believe, from Baker's representations that Urban would receive all the compensation to which it was entitled due to the acceleration (Tr. 104, 107, 169). In any event, under the terms of the subcontract, Urban was bound to the new completion dates set in Modification 11 to the same extent as was Baker (See

Ex. H and Ex. O), and this was the general understanding of the parties as well (Tr. 430-433). Pursuant to the understanding that the contract would be accelerated, Urban did in fact accelerate its performance under 1302 (Tr. 49), although none of the advanced dates were as originally contemplated under the subcontract or Modification 6 (Tr. 73).

In the face of this overwhelming and largely undisputed evidence, we submit that the District Court had no alternative but to reject Baker's contention that there was no acceleration.

**The Evidence Establishes That the Acceleration Increased the Burdens of the Subcontractor Beyond Those Originally Contemplated Under the Contract and Therefore Constituted "Extra Work" Subject to Compensation (Findings X, XI, XII, XIV).**

As was succinctly stated by Judge Pickett of the Tenth Circuit, citing this Court's decision in *Continental Casualty Company v. Schaefer*, 173 F.2d 5 (1949):

> "Burdens other than those contemplated by the contract, may not be placed upon the contractor without additional compensation."

*Wunderlich Contracting Co. v. United States*, 240 F.2d 201 at p. 205 (10th Cir., 1957); cert. den. 353 U.S. 950. See also *Beaty v. Brock & Blevins Co.*, 319 F.2d 43, 44 (6th Cir., 1963).

The Court having found there was an acceleration and that Baker had requested and received a change order allowing at least $146,600 to Baker also found that Urban's

work had likewise been accelerated and Urban was likewise entitled to compensation. The evidence establishes the obvious fact that such a speedup or acceleration results in increased costs, such as having extra manpower, working longer hours, obtaining extra equipment, tools and facilities, expediting delivery of material by air freight and generally sacrificing efficiency in order to gain time. Most of these very items of increased cost are noted in a cost proposal from Baker to the Army Corps of Engineers (Ex. 33, and See Tr. 405-408. See also Ex. 41, p. 4). And it is readily apparent that none of these costs are in their nature peculiar to the operation of a general contractor as distinguished from a subcontractor. Abundant evidence of damage, its nature and extent, was detailed to the court. The testimony showed that fully 80% of Urban's work was accelerated (Tr. 113). Examples of loss of efficiency and resultant increased cost were cited to the court (Tr. 54). It was demonstrated that longer work hours were necessitated, thereby causing double-time wage rates and raising overall labor costs (Tr. 60-62). With additional labor came additional equipment and tool costs (Tr. 115, 116). Evidence was adduced concerning air freight charges made necessary by the acceleration (Tr. 208-209). Each item of damage fairly attributable to the acceleration was compiled in Exhibit 29, and the basis of computation appeared in the attached schedules. Where available, invoices from the job itself were tabulated (Tr. 208). All items of damage were gone over intensively on direct examination (Tr. 187-202, Tr. 208-219), and each was subjected to scrutiny under vigorous

cross-examination (Tr. 234-263). In short, the court was fully apprised as to the exact nature and basis of Urban's claims and was adequately apprised through the cross-examination of all Appellant's views of the weakness in each item underlying the evidence.

**Urban Did Not Voluntarily Incur the Increased Costs of the Acceleration.**

Despite its increased cost, the Baker argument runs, Urban cannot recover for the acceleration because it finished the project within the allotted by the schedule, or as Baker more baldly states the proposition:

> "The attempt to meet [the advanced] completion date was a voluntary undertaking by all concerned." (App. Br., p. 25)

The merest assertion of such a proposition begs credulity. We need not vouch for Urban's altruistic qualities to confidently assert Urban's altruism does not extend to the voluntary undertaking of losses in a business conducted for profit. Inasmuch as Baker's argument on this point is the keystone of its logic, upon which all else depends, we shall nonetheless treat the question with the same degree of importance as it bears to Appellant's argument.

Appellant's theory is that Modification 6 provided for considerable cushion or slack, that would permit the completion dates to be advanced by 30 days. Thus, it is said, Baker posted a construction schedule (Ex. I) on its wall reflecting the shorter period and set these as "target dates" for Urban and other subcontractors. The facts

show Baker then told them, in the words of witness Bernardi, Baker's Project Manager at Clear, "Let's get the thing speeded up, let's get on with the work here." (Tr. 444). In a similar vein, Sam Baker, President of Baker, told Urban's Project Manager, Brewer, "To figure all the job completed by September 15 . . ." (Tr. 657).

Simultaneously with the posting of the schedule and the quoted directions from Baker, in what Baker maintained was a coincidence, the Army directed Baker to accelerate 1302 by one month and put in its price for the speedup (Tr. 422). This directive bound Urban equally with Baker to the advanced completion dates (Tr. 427, 431). Subsequent formalization of the acceleration placed the threat of liquidated damage upon Urban.

Baker's logic plainly requires the assumption that the Army's direction to Baker accelerating performance of 1302 affected only Baker and not Urban. But a gapping fault in this logic is revealed by Mr. Baker's own observation as to the interrelation and unitary nature of the work performed by the prime and the sub:

> "In building," said Baker, "there are so many things that can't be done until someone else completes their work." (Tr. 613; see also Tr. 50.)

It requires little understanding of construction to realize that mechanical work often precedes and must at least be coordinated with other aspects of a building. Finally and conclusively, the testimony is clear that Urban enjoyed no cushion under the acceleration schedule (Tr. 158-159). Manifestly, an acceleration of Baker's perform-

ance would have a similar effect on Urban.

In this factual setting, we submit the District Court was entitled to disbelieve Baker's protestation that the making of the schedule and the preparation of Modification 11, each with substantially identical completion dates, was coincidental (Tr. 417-418).[3] And in view of Baker's direction to "Get the thing speeded up" (Tr. 444), its requests for cost proposals for so doing, and Urban's reasonable expectation of compensation (Tr. 104, 107), it cannot fairly be concluded that Urban undertook the additional work as a volunteer.

That Urban did not object to the schedule and agreed to try to meet it, is not tantamount to saying, as Baker apparently does, that Urban expected no compensation for its increased efforts (See Tr. 169). On the contrary, at about the time the schedule was first released, Urban's job superintendent, Brewer, asked Baker for additional compensation for the acceleration (Tr. 423) and we have seen that Urban fully expected to receive it (Tr. 169). Indeed, in view of the fact that Baker's agreement with the Army to accelerate the completion dates was equally binding on Urban under the subcontract, protest would have been a futile gesture. Baker seeks also to draw the

3. Baker claims Modification 11 with the Army occurred long after posting of the schedule. It is true the agreement and final price was formalized on June 27, 1960. (See Ex. 26.) But the earlier completion date ultimately incorporated in Modification 11 was requested of Baker by the Army along with an invitation to submit a price proposal on April 29, 1960 (Ex. 25, Tr. 502, 503) and it was common knowledge on the job as early as April 8, 1960 that the job would be accelerated (Tr. 414). Urban's first cost proposal was in Baker's hands in May 1960 (Ex. 8) and was resubmitted shortly thereafter (Ex. 9). (See Tr. 49, 107, 108.)

facile conclusion that Urban's compliance with the schedule was a voluntary effort from the circumstance that Urban did not know the contents of Modification 11 until long after the contract was completed. (The only substantive provision of Modification 11 unknown to Urban was the provision for payment to Baker alone of some $146,000.00.) This fact will simply not sustain the burden of the conclusion Baker attempts to draw from it. Passing the circumstance that Baker seeks to gain by its own wrongful failure to protect Urban's interest in negotiating costs with the Corps of Engineers,[4] the fact remains that an acceleration of Urban's obligation occurred and no compensation for Urban was forthcoming despite its request for and reasonable expectation of payment, an expectation nurtured by Baker himself (Tr. 104) until the meeting at the Washington Athletic Club.

**Competent Evidence Established the Fact of Damage and Its Amount (Findings XIII, XVI).**

Baker's attack on the court's findings as to the damage

4. An evolving line of cases is fleshing out the rights and obligations among and between the prime contractor, the subcontractor and the owner. Of course, the sub is not in contractual privity with the owner. Yet agreements between the owner and the prime have a direct effect on the sub, a classic illustration of which is exhibited in the case at bar. Accordingly, the cases have spoken of the relationship between prime and sub as "somewhat analogous to that of trustee and *ceste que* trust" [*Allegheny County Housing Au. v. Caristo Const. Corp.*, 90 F. Supp. 1007, 1010 (D.C. Pa. 1950)] requiring the prime to transmit and urge the subcontractor's claims before the owner. *Boomer v. Abbett*, 263 P.2d 476 (Cal. 1953), and see *United States v. Hensler*, 125 F. Supp. 887 (D.C. Cal. 1954). Given this duty, we think it an obvious corollary, applicable to this case, that the prime must protect the subcontractor. Here this is what Baker pretended to do and is what Urban thought was happening. But Baker instead negotiated for itself alone although it then had in hand Urban's cost estimates.

sustained by Urban breaks down into three major points. First, conceding the fact of damages, it is contended that the testimony of Mr. Urban could not establish the quantum of damage due to the acceleration. This follows, maintains appellant, because Mr. Urban's testimony was based on his opinion and estimates, was hearsay and not based on personal knowledge. Secondly and separately, appellant contends in the teeth of the evidence, that certain summaries must be excluded because they were unavailable for his inspection and cross-examination (App. Br. p. 28, 29). Appellant's final point is a rehash of his running quibble with the District Court over the computation of damages. As we will show, each of these claims lacks merit.

**A. Mr. Urban's Testimony Based on His Opinion and Estimates Was Competent to Establish the Quantum of Damage**

A party to a case is not disabled, as perhaps he was under the long discarded common law rule,[5] from offering his opinion as to the amount of damages. *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561, 595 (10 Cir., 1962); *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 473 (9 Cir., 1964) (dictum). Here, Mr. Urban was a man of long experience in the plumbing and heating industry, familiar with all phases of the work, and had operated in Alaska since 1947 (Tr. 177, 178). Contrary to Baker's assertion, Mr. Urban was at Clear during the course of the project there (Tr. 178, 197). He was in constant telephone communication with and reviewed memos from the job site

5. See McCormick, *Evidence* §65 at p. 142 (1954).

personnel (Tr. 178, 179). We submit this was ample qualification for him to testify as to his opinion of the damages his company incurred. The trial court's discretion controls as to the ability and qualification of an expert witness to throw light on the issue before the court with opinion testimony. *Standard Oil Co. v. Moore,* 251 F.2d 188, 221 (9 Cir., 1958), cert. den., 356 U.S. 975; *Congress & E. Spring Co. v. Edgar.* 99 U.S. 645, 658 (1879). The usual evidentiary requirement of first-hand knowledge is not invariable; expert testimony often does not depend for its efficacy upon first-hand knowledge. *Congress & E. Spring Co. v. Edgar, supra,* 99 U.S. at 657. Nor are the foundation facts[6] upon which Mr. Urban based his estimates susceptible to a hearsay objection. In the main, the estimates were based upon summaries of office records kept and utilized in the ordinary course of business (Tr. 144-145, 222, 237). Long ago, the Supreme Court declared in connection with price lists prepared from sources unavailable at trial for cross-examination:

> "We think the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in Wendell. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury." *Cliquot's Champagne,* 3 Wall 114, 141 (1866).

---

6. The requirement of adequate foundation facts is clearly enunciated in *Lessig, supra,* 327 F.2d, at p. 473.

And this court has ruled, even in the absence of the circumstantial guarantee of reliability induced by keeping records in the ordinary course of business, that:

> "It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, insofar as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, whether the expert sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be expressed." *Standard Oil Company of Calif. v. Moore, supra,* 251 F.2d at p. 222.

Two additional considerations underpin the propriety of the District Court's decision to admit the evidence: This was a case tried to a judge well equipped to assess the probative value of the evidence offered; not to a lay jury unfamiliar with the relative trustworthiness of evidence. The second consideration is founded on necessity: In most instances, there was no way other than estimates to extrapolate a reasonable approximation of the damages assignable to the acceleration (Tr. 188). Acceptance of appellant's objections would mean that damages actually sustained could not be adduced by proof. As a practical matter, the man in charge of estimating and performing work for a large enterprise is the only one able to know and assemble costs of labor, cost of materials, freight, taxes, insurance, overhead, and

all of the other items of expense upon which the success of the business depends.

**B. The Summaries Were Properly Admissible In Evidence and Opportunity Was Afforded for Examination of the Core Facts Used in Their Preparation.**

> "It is long established that, where records are voluminous, a summary, either oral or written, may be received in evidence." *Sam Macri & Sons, Inc. v. U.S.A., infra,* 313 F.2d at 128-129.

Such summaries arguably raise questions of hearsay. But such objections evaporate where opportunity is afforded for examination of the core facts or source of the summaries. Opportunity for such an examination is all the law requires; whether the opportunity is exercised is immaterial. *Sam Macri & Sons, Inc. v. U.S.A., supra,* 313 F. 2d at p. 129.

Here, the bulk of the evidence comprising the summaries in question was gone over in the deposition of John Way, Secretary-Treasurer of Urban. (Mr. Urban's deposition was taken at the same time and place.) This deposition was conducted in Urban's home office in Portland, Oregon, and all the materials were available for inspection by counsel for Baker (Tr. 206-207, Tr. 223). Much of this was available for inspection in the courtroom and could have been, but was not, utilized in cross-examination (Tr. 571). Significantly, the court's pretrial discovery order specifically provided for inspection of any and all records at Portland (R. 27-28) and Appellant nowhere asserted that all were not available to it. (The

trial court did require Appellant to produce certain basic records when it was shown that these had not been previously produced or made available to Urban (Tr. 561-564). The questioned Exhibit (JJ) was, however, admitted for illustrative purposes (Tr. 567)). In each instance where testimony based on summaries was offered, the source of such evidence was identified with particularity. In this state of the record, Baker's objections to the summaries are clearly without merit.

**C. Damages Were Established With Reasonable Certainty.**

Nowhere is appellant's invitation to this court to conduct a *de novo* proceeding or its misconception of the appellate function more apparent than in its, if we may take the liberty to so describe it, rambling review of the District Court's computation of damages. In major part, this review is a rehash of arguments three times presented before the District Court, at trial, in appellant's "Objections to Memorandum of Decision," and in the post-trial motions. Urged on appeal, these objections come too late.

As the Supreme Court said in *Story Parchment Co. v. Paterson Paper Co.*, 282 U.S. 555 (1931), the distinction between the fact of damage and the calculation of their extent must be kept ever in mind:

> "[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount."

*Id.* at p. 562. And see *Linen Thread Co. v. Shaw,* 9 F.2d 17, 19 (1st Cir., 1925). Although *Story* was not an action in contract, the rule applies to such actions as well. *Frank Sullivan Co. v. Midwest Sheet Metal Works,* 335 F.2d 33, 42 (8th Cir., 1964); *Standard Oil Company v. Perkins,* 347 F.2d 379, 386-387 (9th Cir., 1965).

We have pointed out to the court the evidence which shows an acceleration occurred and that this acceleration damaged Urban. Once this dual showing was made, the District Court had a large amount of discretion in determining the amount of its verdict. Cf. *Standard Oil Company v. Perkins, supra,* 347 F.2d at p. 387 (Jury verdict rather than case tried to the court). In *United States v. Smith,* 94 U.S. 214, 219 (1877), the Supreme Court declared this standard of review on appeal from a court of claims determination of damages for breach of contract:

> "In the estimation of damages the Court of Claims occupies the postion of a jury under like circumstances. Damages must be proven. The court is not permitted to guess any more than a jury; but, like a jury, it must make its estimate from the proofs submitted. The result of the best judgment of the triers is all that the parties have any right to expect."

*Id.* And see *Specialty Assembling & Packing Co., Inc., v. United States* (C. of Cls. Slip Opinion Jan. 21, 1966). This court does not sit as a cipherer, as Baker apparently would have it, to substitute its appraisal of the damage testimony for that of the District Court. It would be inconsistent with this court's function of deciding questions of law to review in detail the computation of dam-

ages. Moreover, there is no assurance that such a review would lead to a more just result. Mathematical errors, if any, may be corrected, as was done in this case, by appropriate post-trial motions to the District Court. The measure of damages in a case of this kind is the reasonable value of the extra work. *Continental Casualty Co. v. Schaefer, supra; Sam Macri & Sons v. United States, supra.* The record will be searched in vain for an instance where the standard of reasonableness was not observed, or where damage items in detail or total exceeded the limits of proof. In sum, we emphasize to the court the fact that Baker has not particularly questioned individual items of damage, but only the computation of their amount.[7]

**The Contract Requirement That Extras Be Previously Agreed Upon in Writing Was Waived (Finding XIX).**

Several times this court has noted that provisions of this type are for the protection of the parties for whom the work is done; they provide a means whereby the owner may remedy the trouble, thus avoiding the "surprise" of an unforeseen claim. *Macri v. United States,* 353 F.2d 804, 807 (9th Cir., 1965); *Sam Macri & Sons, Inc. v. United States, supra,* 313 F.2d at p. 128; *Continental Casualty Co. v. Schaefer, supra,* 173 F.2d at p. 8. Where this element of surprise is lacking, written notice is a useless thing and thus the cases recognize compliance with such a requirement may be waived. *Id.*

7. Nonetheless, references to the testimony pertaining to each item of damage in the acceleration claim is collected in the Appendix of this brief.

Here, Baker told Urban early in May, 1960, that additional costs should be submitted and Urban requested additional compensation (Tr. 423, 457, 468, Ex. 8, Ex. 9). Urban was told that it was behind schedule (p. 11, Dep. of McConigal Tr. 772, *et seq.*) and was told to "speed it up" (Tr. 444). Baker expected completion by September 15, 1960 (Tr. 657). In the construction business, particularly when, as here, time is of the essence, oral agreements or orders are often not formally executed in writing until after the work is completed or well under way. Baker's Project Supervisor, Bernardi, said with reference to "paperwork" on the job:

> "[I]t was just one of those jobs that had to be done and they had to take a lot of short cuts to get the thing done." (Tr. 382) and he believed it fair to say:
>
> "In fact, on this job, contrary to most jobs, verbal orders did go on lots of occasions. . . ." (Tr. 383).

Urban's foreman never received a written order during the course of the job. He proceeded on verbal directions on many occasions including a large number of changes which were undisputed (Tr. 58). The trial court fairly concluded the contract requirement that extras be previously agreed upon in writing was waived.

**Extras Beyond the Scope of the Subcontract Were Performed by Urban and Substantial Evidence Supports the Award of Compensation.**

Common to each of the disputed items is Baker's simplistic assertion that the work performed was "plumbers'

work" and thus within the scope of the contract requirement that Urban perform "all mechanical" work on 1302.

The argument assumes too much. Under its unlimited rationale, Baker could impose any and all burdens on Urban so long as the work was "plumbers' work" and regardless of whether Baker itself created the necessity for such work and regardless of the detailed plans and specifications incorporated in the subcontract. Such is not the law. If by default of the prime contractor, the cost of materials and work provided for in a building contract has been increased, the subcontractor may recover the reasonable value of the additional work necessitated. 13 Am. Jur.2d, *Building Contracts,* §19 at p. 21-22 (1964). For:

> "There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of the performance."

*Miller v. Othello Packers,* 67 Wn.2d 829, 830-831 (1966). See *Lichter v. Mellon-Stuart,* 193 F. Supp. 216 (D.C., Pa., 1961). See also *Northeast Clackamas C. E. Co-op. v. Continental Cas. Co.,* 221 F.2d 329, 334 (9th Cir., 1955).

The limit of Urban's obligations under the subcontract was fixed by the plans and specifications; to the extent that deviations from those plans occurred, the work thereby created was "extra" and subject to additional compensation. Such was the understanding of the parties to the contract as well (Tr. 286-287, 289, Tr. 652 (Baker)). Evidence as to each specific item of extras follows.

Before turning to those items, however, it is interesting to note that Appellant states it will treat with the evidence in the light most favorable to Urban and then proceeds to rely on the evidence of its own witnesses and argues that inferences favorable to it must prevail over the trial court's determination from all of the evidence. Nonetheless, the evidence supports each of the claims allowed.

**Connection of Kitchen Equipment**

The kitchen equipment, furnished by another subcontract or (Tr. 38), did not conform to the drawings furnished by Baker (Tr. 37, 94) nor to the "rough-in" plumbing installed in accordance with the contract drawings. Alterations and additions had to be done to make connections to the equipment when it arrived (Tr. 38, 41, Tr. 94). Baker ordered the hookup to be made (Tr. 39, 41), as is conceded by Appellant (App. Br. p. 55). Time sheets and material costs fairly reflecting the additional charges necessary were kept (Tr. 37, 41, 42, Tr. 94-95). The Court's award was in accord with this figure (Ex. 21), Finding VII(a)).

**Connecting Waterlines and Drains to Refrigerator**

The drains and waterlines required for the refrigeration equipment did not correspond with the contract drawings; new pipes had to be placed in the concrete when the equipment (furnished by *another* subcontractor) arrived at the job (Tr. 39-40; Tr. 93-94). Baker concedes that it requested the new drains and line be installed (App. Br.

p. 56). Costs were kept fairly reflecting the additional costs of connecting the equipment (Tr. 40-41, Tr. 94-95) (Ex. 19). This we submit, is ample basis for the court's award (Finding VII(b)).

**Installation of Grease Interceptor Extensions**

The grease interceptors as specified in the plans and specifications would not fit the job because of some large beams installed by Baker (Tr. 44, p. 7, Dep. of John Way). Alterations had to be made (Tr. 45) because field conditions prevented their installation. Someone, apparently connected with Baker, contacted Urban and told it to put the interceptors on (Tr. 45). Certainly, Baker knew of the problem. (Ex. U). Records were kept of the time spent on the job and were turned in to Urban (Tr. 45, see Ex. 16) and invoiced to Baker. These constituted the basis of the court's award (Finding VII(c)).

**Repairing Water Main Leak**

Two or three waterline leaks developed (Tr. 98) at the camp where workmen were lodged and it was understood that Baker expected Urban to fix them (Tr. 43, 118, 356-357). Beyond dispute, camp maintenance was Baker's responsibility (Tr. 356, 358) and these leaks occurred in connection with operation of the camp (Tr. 97-98). The cost breakdown for repairing the leaks is compiled in Exhibit 3 (Tr. 59-60) and the testimony is that the amount of damages as found by the court is a reasonable sum (Tr. 43) (Tr. 99-100) (Finding VII(d)).

Little need be said of Appellant's unsupported assertion that the District Court had no jurisdiction to decide this claim. The admitted facts demonstrate an adequate basis for diversity jurisdiction (R. 22-23, See R. 1 and 2). In any event, the well established doctrine of pendent jurisdiction is sufficient to sustain the District Court adjudication.

Though conventionally applied in the context where an unfair competition claim is joined with an action for patent infringement, the doctrine is not limited to such a situation. See, for example, *Murphy v. Kodz,* 351 F.2d 163, 166 (9 Cir., 1965). And here the nexus between the water leak claims and those concededly falling within Miller Act jurisdiction is ample to sustain the court's exercise of jurisdiction. See *Anno.,* Modern Status of Rules as to Pendent Federal Jurisdiction over Nonfederal Claims, 5 A.L.R.3d 1040 (1966).

We pass briefly on Baker's repeated contention that despite the validity of Urban's claims, it is barred by the contract requirement that there be a prior agreement in writing as to extras. Bluntly stated, Baker's argument is an Alice in Wonderland approach to the realities of job procedures employed at construction sites where formality usually yields to practicality. And Appellant's position is curiously inconsistent with the procedures it followed in actual practice. The facts show that Baker never sent a written order or directive for doing extra work. Most of this extra work was not in dispute here and there was never a problem concerning Urban's right to com-

pensation (Tr. 96-97, Tr. 58-59).[8] Application of the principles governing waiver which we have discussed at some length in connection with the acceleration claim, clearly supports the Court's determination of waiver under the facts here.

**Bond Premium and Alaska Business Tax Are Proper Items of Damage (Finding XV).**

The trial court found, in accordance with the testimony, that it is usual and customary upon an award of extra claims on a construction contract to add the Alaska gross business tax and increased bond cost which automatically attach to the increase in contract price and gross receipts.

It is true that Baker agreed to bear the cost of Urban's performance bond and the trial court simply enforced that promise in its judgment. Urban will be liable for the premium and the taxes upon collection of the award and Baker will not be.

Alaska business tax and bond cost at 1¼% were itemized upon Exhibit 29 submitted prior to the trial in accordance with the pre-trial order and detailed upon all of the extra billings. They are a "standard and usual charge" (Tr. 218). Appellant's argument here is simply an afterthought questioning items all parties realized are additional expenses automatically incurred upon an award of additional costs and receipt of which is required to

8. See pretrial order of Feb. 18, 1963, p. 3 (R. 22), items 2, 3(a), (b), (c), (d), (e) and 4 wherein plaintiff conceded a $12,000.00 deletion and defendant conceded at least six items of extra work totaling $44,511.37, all without any previous order in writing.

make the recipient whole. Appellant did not raise this issue anywhere in its 40 page memorandum upon the motion for new trial (see Baker's memorandum in support of motion and Objection to Findings, R. 106-145) although it questioned virtually everything else. Error, if any, cannot be complained of for the first time on appeal. *Macri v. United States, supra,* 353 F.2d at p. 808.

**The Award of Interest Was Proper Under the Undisputed Facts (Finding XVIII, See Ex. 31)**

Baker's argument that interest was improperly allowed hinges on its unsupported assertion that the court found that Urban did not complete its performance under the subcontract until October of 1961, thus placing Baker's payments in April, October and November, 1961, within the contract requirement that "final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work." Baker nowhere questions the fact that $104,896.37, at least had been earned and was due by January 1, 1961.

Finding V (R. 83), which is undisputed, clearly establishes that the work performed by Urban during October, 1961, was work constituting a modification to the contract ordered after completion of all of the contract work, payment for which also was not in dispute by the time of trial. Baker points to no evidence demonstrating otherwise. More vitally, Finding XVII (R. 89), which is also undisputed, shows that Urban completed all work under the subcontract by November 20, 1960. The facts show that Baker successively tendered four checks during 1961, each

"in final payment" for Urban's already completed performance under the subcontract. (Tr. 224-227, Ex. V, Ex. 18F, Ex. 18I, p. 15-19 McConigal Dep.). Interest was computed from January 1, 1961, to the date of tender on each of the liquidated sums Baker agreed was due (Tr. 227-228). Plainly enough, interest was forthcoming and was properly allowed on the items.

**The Award of Attorney Fees Was Proper (Finding XX)**

Urban prevailed upon all contested issues of fact except items 5 and 7, albeit not in the exact amount claimed. (See Pre-trial Order R. 23, 24.)

Baker's argument on this point rests entirely on the fact that Urban did not recover the full amount of each of the claims alleged in its complaint. This court's decision in *Macri & Sons v. United States, supra,* 313 F.2d 119, is cited as supporting authority for the argument.

Even ignoring that the award of attorney fees to the subcontractor was sustained in *Macri* and that the language appellant purportedly quoted from that decision is nowhere to be found in the official reports, yet another reason distinguishes the *Macri* situation from the case at hand. In *Macri* there was a counter-claim (designated a cross-complaint because the cause of action had been assigned) by the prime against the sub arising out of delay allegedly caused by the sub upon which an award was made.

A situation where there is a counter-claim is very different from one, as here, where only the liability and

amount of damage payable by the prime must be ascertained. In the counter-claim situation, there may be a basic and substantial dispute as to who is responsible for the damages on a particular project. In the situation at bar, it has never been contended that Urban is in any way responsible for any damages or liable to Baker. A party should not be put to the peril of proving damages exactly equal to his complaint in order to recover attorney fees. See *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964). In many cases, calculation of damages has subjective elements and cannot be calculated with precision.

The holding of *Macri v. United States, supra,* 353 F.2d 804 is more apposite to the situation at hand. There the court ruled that the District Court's discretion governs the award of attorney fees. The award at bar was authorized under Alaska law (Alaska Comp. Laws Anno., §55-11-51; Rule 82, Alaska Rules of Civil Procedure), and no abuse of discretion is shown.

**Contrary to Appellant's Insinuations, the Trial Judge Conducted a Fair and Impartial Inquiry.**

We would be remiss in our duty to uphold the integrity of the Court (Canons of Professional Ethics, 1 and 32) if we passed without mention Appellant's wholly gratuitous insinuation that the Trial Judge was guilty of misconduct or that his decisional faculties were somehow disrupted by the Alaska earthquake. (See App. Brief p. 66-67.) The record demonstrates that the trial proceeding leaves nothing to be desired in the way of fairness or

competency on the part of the able District Judge. Prior to entry of judgment, the Court entered a memorandum of decision explaining the basis of its action (R. 71-76). In fact, on several items of damage, the Court upon its independent review of the evidence reduced Urban's recoveries (R. 74-75). Again, on Baker's post trial motions, the Court rendered a new memorandum of decision (R. 164-165). The Court again reviewed the evidence and went to some pains in stressing the role credibility played in its determination. The Court noted that it was "impressed by and believed the testimony given by Mr. Urban" (R. 165), Urban's key witness on the damage issue.

We have not taken the drastic step of moving to strike Appellant's brief in the interest of expediting final determination of this appeal. See *Kellogg v. Wilcox,* 283 P.2d 677 (Wash. 1955).

**Motion for Costs of Printing Briefs and Attorney Fees on Appeal.**

Appellee does, however, pray for an award of attorney's fees to be fixed by the court upon this appeal together with the actual costs thereof to be taxed by the clerk.

State law governs whether attorney's fees will be allowed in a Miller Act proceeding, *United States for Brady Floor Covering, Inc. v. Breeden,* 110 F. Supp. 713 (D.C. Alaska 1953); *United States v. Elwin,* 219 F. Supp. 418 (D.C. Alaska 1961); *Sam Macri & Sons, Inc. v. U.S.A., supra,* 313 F.2d at p. 130.

A.S. 09.60.010 provides:

> "Except as otherwise provided by statute, the Supreme Court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case."

And Rule 54(d) F.R. Civ. P. provides in pertinent part:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . ."

Where attorney fees are allowed as costs pursuant to statute, the award may embrace attorney fees on appeal as well. See *American Crystal Sugar Co. v. Mandeville Island Farms,* 195 F.2d 622, 626 (9th Cir. 1952). See also *Boyd Callan, Inc. v. United States,* 328 F.2d 505, 511-512 (5th Cir. 1964) (semble). Alternative authority for the same result stems from the provisions of 28 U.S.C. §1912. See *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 802 (9th Cir. 1949).

## CONCLUSION

The judgment of the District Court was right and should be affirmed, together with costs and an attorney's fee to Appellee.

Respectfully submitted,

Donald McL. Davidson
William B. Moore
of Ferguson & Burdell,
*Attorneys for Appellee,*
929 Logan Bldg., Seattle, Wash.
MA 2-1711

## CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

DONALD MCL. DAVIDSON
WILLIAM B. MOORE
*Attorneys for Appellee*

## APPENDIX

Some references of direct testimony to detailed items of cost and their manner of calculation which underlie the court's award of $80,519.24 for the acceleration follows:

*Total* ..... $80,519.24

Brewer's first submittal (assuming overtime Tr. 108) Ex. 8 of May 21, 1960—$78,379.23.

Brewer's second submittal (excluding premium pay, Tr. 108) Ex. 9, prior to June 1, 1960.—$48,470.78.

Fred Urban estimate (after job based on actual time cards and invoices, Tr. 218), $135,226.16, Ex. 29.

*Labor Costs Only*.....($30,389.40 allowed)

Actual excess labor costs alone were between $90,000.00 and $100,000.00 (Tr. 191).

Method of computing costs is that used in negotiating with the Corps of Engineers and for estimating jobs generally (Tr. 195).

There is no method of precisely calculating labor inefficiency or lost time on a minute by minute basis and estimating techniques must be used (Tr. 188).

The method used was the same method used for bidding the job (Tr. 189). Costs were (Ex. 29) $54,468.86.

*Increased Cost of Small Tools and Equipment*..... $4,972.22 allowed

2½% of labor cost is Urban's standard method of estimating small tool costs and it is checked against and verified by company experience (Tr. 198).

Urban is obligated to furnish tools to new employees, a complete set of which costs $450.00 (Tr. 198).

About 18 additional men were required for the acceleration (Tr. 214).

Four (4) more welders were required and the usual and standard going rate is $170.00 per month for each (Tr. 200-201), two extra welders being rented at the job site from others (Tr. 116).

A Volkswagen, six-passenger truck had to be sent to the job because of the additional men required (Tr. 116) and $225.00 monthly rental is the rate paid for that type of equipment (Tr. 201).

Extra equipment necessarily used extra gas and oil and all of the equipment was subjected to extra usage causing extra wear and tear and maintenance costs necessarily requiring an estimate (Tr. 201).

Total cost including specifically known and estimated items was $8,527.35 (Tr. 202).

*Special Shipment Costs....* $3,043.31 allowed

Tabulation of invoices for air freight and special transcontinental trucking (Tr. 208) $4,349.81 excluding normal freight bills (Tr. 209).

*Labor Double Time Costs* ..... $5,833.40 allowed

Based upon payroll reports (Tr. 212) of actual hours on Sundays and holidays (Tr. 213) over and beyond a 54-hour week (Tr. 214) being only a small portion of the 1551 overtime hours verified by defendent's auditor (Tr.

144, Tr. 213), Ex. 29, $8,129.63.

*Mobilization and Transportation of Additional Plumbers* $2,4.99.12 Allowed

A man's pay started when he left the union hall in Fairbanks and Urban also paid for his air travel (Tr. 117) including cab fare. Air fare was charged at actual cost together with actual travel pay required on an estimated additional 18 men (Tr. 214) plus normal turnover of the additional employees (Tr. 215). $2,499.12.

*Increased Camp Costs at $12.00 Per Man Day*

1050 man days at $12.00
or $12,600.00 allowed.

| | |
|---|---|
| Actual extra man days 2850½ at $12.00 | $34,206.00 |
| Estimated due to acceleration, 1050 at $12.00 | $12,600.00 |

In summary, upon specific items the Trial Court allowed two items in the amount claimed, one for one-third of the actual extra cost of labor and another for air fare and travel pay substantially supported by invoices actually paid. The Trial Court awarded approximately one-third of the actual excess labor cost and about three-fifths of the amount claimed upon a combined estimating and time card basis.

Machinery and small tool costs were allowed at about five-eighths of the amount claimed, the court apparently disregarding estimated items such as wear and tear and extra gas and oil.

Some invoices for special shipment were not allowed although almost three-fourths were recognized.

Finally, it should be pointed out that the Court's findings were that the proof showed "at least" (Finding XVI, R. 88) the amount of each item and that:

> 'The fair and reasonable value of the extra work required of this plaintiff in accelerating the work *was not less than $80,519.24*" [emphasis supplied, Finding XIII, R. 87].

In every instance of damage, by item or total, the Trial Court evaluated the evidence and would have been justified in a far larger award, which would not even then have reimbursed plaintiff for its actual cost.